

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

TONY FLOWERS,)	1:01-cv-05821-AWI-DLB-HC
)	
Petitioner,)	ORDER ADOPTING FINDINGS AND
)	RECOMMENDATIONS (Doc. 44)
v.)	
)	ORDER DENYING PETITION FOR
ANTHONY LaMARQUE, WARDEN,)	WRIT OF HABEAS CORPUS
)	
Respondent.)	ORDER DIRECTING CLERK TO
)	ENTER JUDGMENT

Petitioner is a state prisoner proceeding pro se with a
Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254.

On July 15, 2005, the Magistrate Judge filed Findings and
Recommendations that recommended the Petition for Writ of Habeas
Corpus be DENIED, and that the Clerk of Court be directed to enter
judgment in favor of Respondent. These Findings and
Recommendations were served on all parties and contained notice
that any objections were to be filed within thirty (30) days from
the date of service of that order. On August 10, 2005, Petitioner
filed a motion to extend time. On September 12, 2005, the court
granted Petitioner thirty (30) days within which to respond. On
September 16, 2005, Petitioner filed objections to the Findings and
Recommendations.

1 In accordance with the provisions of 28 U.S.C. § 636
2 (b) (1) (C), this Court has conducted a *de novo* review of the case.
3 Having carefully reviewed the entire file, including Petitioner's
4 objections, the Court concludes that the Magistrate Judge's
5 Findings and Recommendations are supported by the record and proper
6 analysis. Petitioner's objections present no grounds for
7 questioning the Magistrate Judge's analysis.

8 In his objections, Petitioner primarily takes issue with the
9 Magistrate Judge's finding that trial counsel was not ineffective
10 for advising Petitioner to pled guilty to a sentence of life with
11 the possibility of parole in seven years. The court has reviewed
12 the relevant declarations and log sheets. The court agrees with the
13 Magistrate Judge that the evidence does not support a factual
14 finding that Petitioner was offered the choice of a fourteen year
15 determinate sentence or a life with the possibility of parole
16 sentence on the day of trial. At best, Petitioner has shown that
17 he may have been offered a fourteen year sentence at an earlier
18 time; but it appears this offer would have only resolved the
19 carjacking count and not have resolved the pending kidnaping count.
20 Even assuming Petitioner's attorney did advice him not to take a
21 fourteen year determinate sentence, Petitioner's attorney's
22 inaccurate prediction of which sentence would actually turn out to
23 result in more prison time does not rise to the level of a gross
24 mischaracterization of the likely outcome of his case, and thus did
25 not fall below an objective standard of reasonableness. See
26 Doganieri v. U.S., 914 F.2d 165, 168 (9th Cir. 1990).

27 In addition, the court agrees with the Magistrate Judge that
28 Petitioner's claim regarding counsel's advice on a possible

1 fourteen year sentence is procedurally defaulted. While Respondent
2 bears the ultimate burden of proving a state procedural rule bars
3 federal review, Petitioner has failed to carry his initial burden
4 of demonstrating the inadequacy of the state procedure, including
5 citation to authority demonstrating inconsistent application of the
6 rule. See Collier v. Bayer, 408 F.3d 1279, 1284 (9th Cir. 2005);
7 Bennett v. Mueller, 322 F.3d 573, 586 (9th Cir. 2003).

8 Accordingly, IT IS HEREBY ORDERED that:

- 9 1. The Findings and Recommendations, filed July 15, 2005,
10 are ADOPTED IN FULL;
11 2. The Petition for Writ of Habeas Corpus is DENIED; and,
12 3. The Clerk of Court enter judgment in favor of Respondent.

13
14 IT IS SO ORDERED.

15 **Dated: December 21, 2005**
16 0m8i78

/s/ Anthony W. Ishii
UNITED STATES DISTRICT JUDGE